

The respondent requests review of this decision alleging that he not only failed to receive notice of the motion hearing, but that the costs associated with the hearing should be assessed against claimant rather than respondent. And respondent requests the Board enter a finding that the time to prosecute this claim has expired.

Claimant maintains it complied with the statutory requirements by filing the motion to extend within the 5 year period. And he further maintains the motion was sent to respondent's counsel. Nonetheless, claimant indicates that he has no objection to a remand to the ALJ for a rehearing on the motion to extend.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant alleges an injury occurred on January 18, 2002. An Application for Hearing (E-1) was filed on May 21, 2002. At some point claimant was incarcerated and as a result, the progress of this claim as well as the contact between claimant and his counsel ground to a halt.

Effective July 1, 2006 the Legislature imposed a 5 year deadline on the prosecution of claims. That statute provides as follows:

(f) Any claim that has not proceeded to final hearing, a settlement hearing, or an agreed award under the workers compensation act within five years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, shall be dismissed by the administrative law judge for lack of prosecution. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, **provided such motion to extend is filed prior to the five year limitation provided for herein.** This section shall not affect any future benefits which have been left open upon proper application by an award or settlement.¹

On May 14, 2007, claimant filed a motion to extend pursuant to K.S.A. 44-523(f). The motion indicates that a copy was served upon respondent's counsel at his business address that same day. According to the motion, claimant's counsel has lost contact with his client. Counsel intended on searching for his client in the hopes of clarifying claimant's present condition and his intentions with respect to the claim.²

Respondent maintains that he received no copy of the motion. Moreover, he adamantly maintains that he received no notice of the hearing on the motion which was held on May 21, 2007. And as a result, respondent maintains there was no jurisdiction for

¹ K.S.A. 2006 Supp. 44-523(f). (emphasis added).

² M.H. Trans. at 2-3.

the ALJ to issue any order. Yet, respondent goes on to argue that the ALJ - and now the Board - should issue an order dismissing the claim pursuant to K.S.A. 44-523(f).

Claimant's counsel concedes that no notice of hearing was mailed by his office as his office erroneously assumed that the ALJ's administrative assistant would be sending out such notice as she was the one who initiated the hearing date.³ For this reason, claimant has no objection to a rehearing on his motion although he adamantly contends that the motion was sent to respondent's counsel as required.

The constitutional requirements of due process are applicable to proceedings held before an administrative body acting in a quasi-judicial capacity.⁴ The Kansas Supreme Court has recognized in numerous cases that the right to cross-examine witnesses testifying at administrative hearings of a quasi-judicial character is an important requirement of due process.⁵

In *Adams*⁶, the Kansas Supreme Court stated:

In 73 C.J.S., Public Administrative Bodies and Procedure, § 132, pp. 456-458, we find the essential elements of an administrative hearing summed up in this way:

"An administrative hearing, particularly where the proceedings are judicial or quasi-judicial, must be fair, or as it is frequently stated, full and fair, fair and adequate, or fair and open. The right to a full hearing includes a reasonable opportunity to know the claims of the opposing party and to meet them. In order that an administrative hearing be fair, there must be adequate notice of the issues, and the issues must be clearly defined. All parties must be apprised of the evidence, so that they may test, explain, or rebut it. They must be given an opportunity to cross-examine witnesses and to present evidence, including rebuttal evidence, and the administrative body must decide on the basis of the evidence. . ."

The requirements of an administrative hearing of a judicial or quasi-judicial character are phrased in this language in 2 Am. Jur. 2d, Administrative Law, § 412, p. 222:

". . . A hearing before an administrative agency exercising judicial, quasi-judicial, or adjudicatory powers must be fair, open, and impartial, and if such a hearing has been denied, the administrative action is void. . . ."

³ Given the fact that this statute is relatively new and the lack of any regulations implementing this new statute, this confusion is understandable.

⁴ *Neeley v. Board of Trustees, Policemen's & Firemen's Retirement System*, 205 Kan. 780, 473 P.2d 72 (1970).

⁵ *Wulfkuhle v. Kansas Dept. of Revenue*, 234 Kan. 241, 671 P.2d 547 (1983).

⁶ *Adams v. Marshall*, 212 Kan. 595, 601-602, 512 P.2d 365 (1973).

The Board finds that the ALJ's Order should be set aside for lack of notice, thus violating respondent's right for due process and the matter should be remanded to the ALJ for further proceedings consistent with the Act.

As for the costs associated with the transcript, the ALJ can address that issue at the time of the final hearing.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Order of Administrative Law Judge Steven J. Howard dated May 21, 2007, is set aside and remanded for further proceedings consistent with the findings made herein.

IT IS SO ORDERED.

Dated this _____ day of September, 2007.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Timothy M. Alvarez, Attorney for Claimant
Steven C. Alberg, Attorney for Self-Insured Respondent
Steven J. Howard, Administrative Law Judge